

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,742

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Aging and Disabilities (DAD) revoking the petitioner's license to operate a community care home for disabled adults. The issue is whether the Department has grounds within its statutory authority to revoke the petitioner's license.

FINDINGS OF FACT

The petitioner has owned and operated a community care home for disabled adults out of her home for several years. In August, 1990, the Department investigated a complaint that the petitioner's son and daughter-in-law, who were "employees" of the petitioner at the home at that time, had improperly treated some of the residents at the home. The petitioner, after meeting with the Department, agreed to terminate her son's and daughter-in-law's employment at the home and orally agreed that they would have no further contact with the residents of the home unless the petitioner, herself, was present.

In July, 1991, while investigating another complaint against the petitioner concerning the provision of medical care to a resident, the Department learned that the petitioner's son and daughter-in-law had been at the home and had been responsible for the residents during a time in which the petitioner was not present. In a letter to the petitioner, dated July, 22, 1991, the Department reiterated that the petitioner's son and daughter-in-law were to have no contact with the residents and have no responsibility for their care. The letter directed the petitioner to do the following:

You must return an acceptable plan of correction for the above mentioned violations by August 2, 1991. Failure to do so could result in fines of up to \$308 a day for each day the violations remain uncorrected. Your failure to follow these directions could also result in the revocation, suspension, or non-renewal of your license.

On August 12, 1991 the Department received a written response from the petitioner that included the statement that her son and daughter-in-law: "don't have anything to do with my clients. They only come

down to visit me."

On August 15, 1991, the Department sent the petitioner the following response:

Thank you for your response to our notice of violation letter.

Your corrections to the violations are accepted. The Department holds the position that, unless you are present, (son and daughter-in-law) should not be in the home.

In October, 1991, a Department investigator made an unannounced visit to the petitioner's facility and found the petitioner's daughter-in-law present and the petitioner

absent. The Department took no further action against the petitioner at that time, however.

The petitioner has received a license certificate from the Department on a yearly basis. Although there is a space on the certificates for "Conditions" to the license, none of the certificates ever issued to the petitioner contained any such condition. The Department maintains that it rarely, if ever, sets forth a specific condition on a license following a "corrective action" by a facility that was for a violation contained in the regulations.

In August, 1993, the Department received a complaint that a resident at the petitioner's facility had been sexually abused at the home by the petitioner's son. In its investigation the Department learned that the petitioner had left her son in the home with the residents while she was away. The Department "substantiated" that the alleged abuse had occurred at that time.

Several months following its investigation the Department, by a letter dated March 30, 1994, notified the petitioner that her license to operate a community care home was being revoked.⁽¹⁾ After a "Commissioner's review hearing" held at the petitioner's request, the Department notified the petitioner, by letter dated May 10, 1994, that

it was affirming its decision to revoke the petitioner's license.

At the fair hearing in this matter, held on May 18, 1994, the petitioner testified that on the day in question she had left her son at the home with her mother (the son's grandmother) while she and her daughter-in-law went out to pick up the petitioner's grandchild from the school bus. The petitioner maintains that she was not gone from the home more than half an hour. She admits that leaving her son in the home was a violation of the Department's directive to her, but says that she "didn't think about it" because she "trusted" her mother to watch him.

The petitioner's mother essentially corroborated the petitioner's testimony in this regard. It appears, however, that she is a physically frail elderly woman. Although she is frequently at the home, she is not an "employee" of the petitioner.

Neither the petitioner nor her mother specifically disputed that the incident of sexual abuse in fact occurred on the day in question. To date, the petitioner's son (who was not present at the hearing) has not contested the Department's "substantiation" of the charge of sexual abuse against him.

ORDER

The Department's decision is affirmed.

REASONS

33 V.S.A. § 7111 includes the following provisions:

- (a) The licensing agency shall enforce provisions of this chapter to protect residents of facilities.
- (b) The licensing agency may require a facility to take corrective action to eliminate a violation of a rule or provision of this chapter within a specified period of time. If the licensing agency does require corrective action:
 - (1) the licensing agency may, within the limits of resources available to it, provide technical assistance to the facility to enable it to comply with the provisions of this chapter;
 - (2) the facility shall provide the licensing agency with proof of correction of the violation within the time specified; and
 - (3) if the facility has not corrected the violation by the time specified, the licensing agency may take such further action as it deems appropriate under this section.

...

- (d) The licensing agency may, after notice and an opportunity for a hearing, suspend, revoke, modify or

refuse to renew a license upon any of the following grounds:

- (1) violation by the licensee of any of the provisions of this chapter or the rules adopted pursuant to this chapter;
- (2) conviction of a crime for conduct which demonstrates the unfitness of the licensee or the principal owner to operate a facility under this chapter;
- (3) conduct inimical to the public health, morals, welfare and safety of the people of the state of Vermont in the maintenance and operation of the premises for which a license is issued;
- (4) financial incapacity of the licensee to provide adequate care and services; or

(5) failure to comply with a final decision or action of the licensing agency.

...

In this case it must be concluded that the petitioner fully understood and acknowledged the Department's "action" in 1991 advising her that her son and daughter-in-law were not to be present in her home unless she was also present. The petitioner does not maintain that the Department's directive was unreasonable or illegal, or that she did not understand the legal consequences that could follow if she did not comply.

It is true that the Department later discovered one other violation of this directive, but took no action at that time. The petitioner does not allege, however, that she understood, or had reasonable grounds to understand, that the Department's inaction in this one instance

constituted a reversal or a modification by the Department of its earlier directive.

Although the Department never made its directive a specific written "condition" of the petitioner's license, it must, nonetheless, be concluded that the Department complied with the statute in requiring the petitioner to take the "corrective action" it had specified. It must also be concluded that this notice that corrective action be taken by the petitioner constituted "a final decision or action" of the Department within the meaning of § 7111((d)(5), supra, with which the petitioner did not comply. The Department is, therefore, within its authority and discretion under the statutes in revoking the petitioner's license, and the Board is bound by law to affirm that decision. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 19, and Huntington v. SRS, 139 Vt. 416, 418 (1981).

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1. The delay in the Department's action was not explained.